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No. 97-1641

In The

Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

PAUL MESSINO, ET AL.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Honorable Court deny certiorari to review the Seventh Circuit's decision reversing the respondent's convictions because the district court failed to provide adequate notice of jury selection procedures, necessary for the intelligent exercise of peremptory challenges, when the issue of inadequate notice of jury selection procedures arises infrequently, is fact-intensive and the courts of appeal that have encountered this particular issue have uniformly reversed, thereby negating the claim of a circuit split?

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STATEMENT OF THE CASE

1. "[U]nique facts" arose during jury selection. *See United States v. Underwood*, 122 F.3d 389, 398 (7th Cir. 1997) (Flaum, J., concurring); Petition for Writ of Certiorari ("Pet.") App. 23a. The respondents' trial attorneys were materially misled as a result of the district judge's "unique procedural protocol during selection," and his unintentional but misleading description of the jury selection process. *Underwood*, 122 F.3d at 397; Pet. App. 19a. Defense counsels' misunderstanding – found to be reasonable by the Seventh Circuit – precluded the knowing and intelligent exercise of peremptory challenges. The jury selection thus resulted in a trial lawyer's worst nightmare: being saddled with a jury different from the one believed to have been picked.

In its certiorari petition, the government fails to quote entirely, or describe adequately, the district judge's explanation of his jury selection method. Before jury selection, the following colloquy occurred:

> THE COURT: What I do, we will go through the questions. You can write your strikes on a piece of paper and come back here. We will do the strikes in chambers so that the jurors don't know which particular attorney struck which particular jurors. My Clerk will go back out there and simply read off their names, tell them to pick up their cards, and tell them to report back to the jury room.
>
> MR. MARTIN [counsel for Christopher Richard ("Dick") Messino]: Do you put them all in a box?

> THE COURT: What I am going to do is to put them all in the box. Since I plan on four to six alternates – is this case still going nine weeks?
>
> MR. SCHNEIDER [AUSA]: Judge, I think eight might be a nice number. Maybe a little more. Once you get up that far, it is hard to project.
>
> THE COURT: I think six alternates. I am going to put them ~~all~~ in the box. Since there are more strikes than defendants, I assume that everybody gets one, and then on the remaining three, you can reach some type of agreement. *We will put 34 in the box in the first two rows. Then the first 18 that are left will be the jury, the fist [sic] 12 being the jury, and the next 6 being the alternates.*
>
> MR. LOEB [counsel for Donald Southern]: We will only strike once, since we have people left over?
>
> THE COURT: Yes. You are going to have people left over. We will do it in the manner in which they are called. Then let's assume you don't use all of your strikes, for one reason or another or the government doesn't, there will be people left over. So it will be on my Clerk's list as she calls them. *It will be the first 18. The first 12 will be the jury, and the next 6 the alternates,* in the manner in which they are called.

2/13 Tr. 10-11 (emphasis added).

After the venire entered the courtroom, the clerk called 38 persons, who filled the jury box and pews in the order called. 2-13 Tr. 24-25. Although not acknowledged or discussed in the certiorari petition, the ensuing voir dire was atypical due to the high number of potential jurors who said that they could not be fair. In all, the

district court excused 27 venire persons for cause. *See* 2/13 Tr. 30-199.

Each time the court excused a prospective juror for cause, another venire person was beckoned from outside the original pool of 38. Upon a potential juror being excused for cause, the already-seated potential jurors did not move up a seat; nor did any replacement potential juror take a seat at the end of the pool. Rather, the replacement juror took the seat vacated by the excused juror, and was immediately questioned by the court. 2/13 Tr. 30, 32, 57-58, 59-60, 61, 64, 65, 69-70, 77, 95, 101-102, 105-106, 116-117, 127, 128-129, 131, 135, 142, 144-45, 149, 154-55, 157-60, 162, 174, 177, 183 and 197-99.

When 38 venire persons had been questioned without being excused for cause, the parties exercised peremptory challenges.[1] 2/13 Tr. 206. After reciting the names of venire persons challenged by each side, the district court began announcing the composition of the jury. 2/13 Tr. 206-07, 27-28. When the court named Pamela Boucher – a women who said during voir dire she was against drugs, but thought she "would be okay," 2/13 Tr. 187 – as the ninth trial juror, a defense attorney interrupted:

> MR. LOEB: We have got her as an alternate according to the way they are sitting now.
>
> THE COURT: No, it is according to this list.

---

[1] The district court rejected Dick Messino's pretrial motion requesting allotment of three peremptory challenges for each trial defendant. R. 551. Therefore, the seven trial defendants jointly exercised ten peremptory challenges for the petit jury and two for the alternates.

2/13 Tr. 207. (The referenced list had not been distributed or made available to counsel.)

Before the jury was sworn, and immediately after the trial court finished naming the petit jurors, defense counsel objected to the jury's composition. *See* 2/13 Tr. 207-213; R. 795. Based upon the court's initial instructions and the visual scenario created by replacement potential jurors taking the seat of excused jurors and being immediately questioned, all defense counsel believed that replacement venire persons were just that, i.e., that they assumed the position, for selection purposes, of the excused venire person. 2/13 Tr. 207-13; R. 795. No defense counsel understood otherwise; no defense counsel thought that the replacement venire persons would take a place after the surviving members of the initial pool of 38.[2] *Id.*

The defense attorneys, however, were mistaken about the manner in which the district court actually selected the jury. It turned out that the replacement jurors moved to the end of the pool instead of replacing the excused prospective juror whose seat the replacement filled. The Seventh Circuit described the misunderstanding as follows:

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[2] Potential juror Christine Miller failed to return on time after lunch. Tr. 92. The district court initially suggested waiting until she arrived. Tr. 92. Attorney Loeb proposed carrying on with jury selection, stating that if she failed to come back, "you can replace her with the next in line." Tr. 92. The court asked whether this was agreeable, and did not clarify the rank of replacement jurors.

> When the judge excused one of the 38 for cause, the judge's clerk would call the name of a reserve juror as a replacement. Instead of crossing out the name of the excused juror and filling in the replacement juror's name on his list, the judge put the replacement juror's name at the end of his jury list. For example, when the judge excused the second juror called, the first of the 38 jurors he excused, the judge called the name of a replacement juror and asked the replacement to take the vacated seat (the second seat in the jury box). However, instead of putting the replacement juror's name second on his list, which would have been consistent with where he seated the replacement juror, he put the name 39th on his list, after the names of the first 38 jurors called. According to the defendant's (mis)understanding of the judge's method, this replacement juror would have been number 2 on the judge's list. Because so many potential jurors were excused for cause, there was a large discrepancy between the first twelve names on the judge's list, and the first twelve names defense counsel *thought* would be on that list.

Underwood, 122 F.3d at 395; Pet. App. 13a-14a (emphasis original).[3]

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[3] The following illustrates the discrepancies between the court's and the respondents' understanding of the ordering of the 38 surviving venire members:

Ordering According to Court's List	Ordering According to Court's Oral Instructions and Defense Understanding
1. Sandra Lazar	1. Sandra Lazar
2. Manserrat Ramos	**2. Gilberto Guevara***

As made known in the district court and accepted on appeal, defense counsel exercised their peremptory

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3. Randall E. Ekvall	3. Manserrat Ramos
4. Christine Miller	4. Randall F. Ekvall
5. Walter Whitfield	5. Christine Miller
6. Patricia Hargrave	6. Walter Whitfield
7. Leon Scott	7. Patricia Hargrave
8. Dennis Tuholski	8. Leon Scott
9. Donice Reeves	9. Dennis Tuholski
10. John Katalinich	**10. Susan Edwards**
11. Thomas McInerney	**11. Richard Kuhn**
12. Robert Harris	**12. Maria Flores**
13. Ann Devereaux	**13. Gwendolyn Johnson**
14. Jack Hareland	**14. Gertrude Burton**
15. Nancy Bubula	**15. Luis Galvan**
16. Michelle Jansen	16. Donice Reeves
17. Alan Kanter	17. John Katalinich
18. Pamela Boucher	**18. Michelle McCain**
19. Barbara Resnick	19. Thomas McInerney
20. Gary Francisco	20. Robert Harris
21. John Royer	**21. Delores Preber**
22. Mohammad Suleman	**22. Eileen Adler**
23. Gilberto Guevara	**23. Ann Devereaux**
24. Susan Edwards	**24. Joseph Sinopoli**
25. Richard Kuhn	**25. John Hollandsworth**
26. Maria Flores	**26. Veronica Horak**
27. Gwendolyn Johnson	27. Jack Hareland
28. Gertrude Burton	28. Nancy Bubula
29. Luis Galvan	29. Michelle Jansen
30. Michelle McCain	30. Robin Strickland
31. Delores Preber	31. Alan Kanter
32. Eileen Adler	32. Joyce Agins
33. Joseph Sinopoli	33. Pamela Boucher
34. John Hollandsworth	34. Barbara Resnick
35. Veronica Horak	35. Gary Francisco
36. Robin Strickland	36. Rose Migacz
37. Joyce Agins	37. John Royer
38. Rose Migacz	38. Mohammad Suleman

* Bold = Replacement juror not among original pool of 38.

challenges in accordance with their expectations and beliefs regarding jury selection. The defense opted not to employ peremptory challenges against certain venire persons who were visually seated at the end of the surviving pool of 38. 2/13 Tr. 207-12; R. 795. Defense counsel did not make challenges they ordinarily would have, believing that the non-preferred venire persons would constitute one of the six alternate jurors, or would not make it to the petit jury, given the possibility of mutual strikes (two occurred here) or the government not exercising all its peremptory challenges. *Id.* In fact, some defense attorneys sought to use peremptory challenges to excuse jurors toward the end of the pool, but were convinced otherwise based upon the universal defense assumption that the jurors at the end of the pool would not be on the petit jury. 2/13 Tr. 209-10; R. 795.

Upon learning that the replacement jurors did not replace previously excused jurors, but went to the end of the line, defense counsel immediately voiced surprise, dismay and objection. 2/13 Tr. 207-13. *See Underwood*, 122 F.3d at 394-95 n. 8; Pet. App. 11a-13a. Defense counsel initially did not ask to redo the jury selection; rather, they asked the court to assemble the jury in accordance with their understanding. 2/13 Tr. 210-13. The court refused, stating that the jury would be selected pursuant to a list the court possessed. *Id.* Defense counsel, however, did not have this list. 2/13 Tr. 209-11. After the court made it clear that it would not constitute the jury in line with defense expectations, motions for mistrial were made and denied. 2/13 Tr. 212-13. Thus, contrary to the assertion in the certiorari petition, Pet. at 7, a request to reorder the jury was not the "sole request" of defense counsel.

The respondents' misapprehension about the selection process resulted in a trial before an adjudicatory body not of their knowing choosing. Aside from the respondents' overall jury selection choices being materially affected,[4] two jurors who decided the respondents' fate, Pamela Boucher and Mohammad Suleman, were identified as being objectionable when the jury selection error emerged. 2/13 Tr. 209-10; *Underwood*, 122 F.3d at 395; Pet. App. 14a ("Relying on their erroneous belief about the judge's list, defense counsel opted not to challenge two particular potential jurors on the belief that they were too far down the list to make it onto the petit jury and if anything, would be mere alternates. These two jurors, however, were among the first twelve on the judge's list, and sat as jurors at trial."). Two other prospective jurors, Delores Preber and Eileen Adler, who the defense believed would be jurors based upon the order in which they were questioned served as alternates.

2. Seven defendants went to trial. Three were acquitted based upon the testimony of many of the same witnesses who testified against the respondents. The four

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[4] Given the court's questioning all possible potential jurors before the exercise of strikes, the respondents necessarily exercised their joint peremptory challenges with an eye toward shaping the jury from the entire 38-member universe. The ordering of potential jurors was, therefore, essential to the knowing and intelligent exercise of strikes. *Underwood*, 122 F.3d at 396-97 & *id.* at 399 (Flaum, J., concurring); Pet. App. 17a & 23a. Because the first juror excused for cause was the second one questioned, and because so many potential jurors were excused for cause, the error here permeated the entire selection process.

respondents were convicted. While the government contends, that the conspirators acquired and resold "hundreds of kilograms of cocaine," *see* Pet. 3-4, the district judge found the convicted defendants responsible for 80 kilograms.[5] *E.g.*, R. 907; 8/17 Tr. 5-9, 21-24.

At trial, the respondents disputed "whether the government met its burden to prove a single conspiracy instead of multiple conspiracies," an issue deemed "close" by the Seventh Circuit, but undecided. *Underwood*, 122 F.3d at 391; Pet. App. 4a. In addition, Dick Messino advanced a defense of withdrawal from the conspiracy before the onset of the statute of limitations. Dick's withdrawal defense derived support from a slew of government witnesses. *See United States v. Christopher Richard Messino*, No. 95-3052, Individual Brief at 4-7 (7th Cir.).

3a. Reversing the convictions of the four respondents, the Seventh Circuit panel, Judge Eschbach writing, found that "the defendants' rights to the intelligent use of their peremptory strikes were impaired [since] [t]he judge's prefatory description of his method of jury ordering did not comport with the method he actually used." *Id.* at 391; Pet. App. 14a. The court determined defense counsels' interpretation of the judge's prefatory remarks

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[5] The certiorari petition notes that Dick Messino and Clement Messino were at one time police officers. Pet. at 3. Dick's status as a police officer has little to do with this case. While the charged conspiracy allegedly commenced in the early 1980's, Dick was a patrolman for approximately one year in the 1960's. Tr. 3977, 4019-20.

– that the potential jurors would be ordered in the manner in which they were seated – to be reasonable, and "bolstered by the visual impact of the order in which the jurors were seated and questioned during voir dire." *Id.* at 395; Pet. App. 15a. The court rejected the government's contention that defense counsel were aware of the judge's selection method, labeling the argument as bordering on "meretricious." *Underwood*, 122 F.3d at 397; Pet. App. 18a. The court ruled that the district court's misleading description "failed to provide adequate notice necessary for the defendants to intelligently exercise their peremptory challenges." *Id.* at 396; Pet. App. 15a.

In reaching this conclusion, the court did not find the judge's jury selection method improper, as long as the parties had adequate notice of the method used. *Id.* at 396; Pet. App. 16a. However, in the absence of notice, so observed the court, the ability to exercise the statutory right to peremptory challenges may be significantly impaired, even if the defendants possess the full allotment of challenges. *Id.* (citing *United States v. Ricks*, 776 F.2d 455 (4th Cir. 1985), *amended on rehearing en banc*, 802 F.2d 731 (1986).) The court illuminated how the error hampered intelligent exercise of peremptory challenges:

> Where, as here, a defendant is faced with more objectionable jurors than he has peremptory strikes, he must make intelligent use of those strikes by considering strategic factors such as the strength of his objection to a potential juror and the likelihood that she will serve on the petit jury instead of as a mere alternate (or not at all) . . . The court's misleading description here caused defendants' incorrect predictions of the likelihood that each potential juror would be

> the "first twelve" and thus sit on the petit jury. Because defendants had inadequate notice of the judge's actual method of ordering potential jurors, their strategic decisions based on a juror's likelihood of sitting on the petit jury were completely subverted. When strategy takes a back seat to chance in this manner, the result can hardly be considered the *intelligent* exercise of peremptory challenges to which a defendant is entitled.

Underwood, 122 F.3d at 396-97; Pet. App. 17a (emphasis original).

Noting that issues of entitlement to a particular type of tribunal generally are not subject to harmless error analysis, the court held that the error necessitated reversal irrespective of prejudice. *Id.* at 392; Pet. App. 6a (citing *Swain v. Alabama*, 380 U.S. 202, 219 (1965); *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1369 (7th Cir. 1990).) Absent discerning a circuit split, the panel joined other circuits that have considered a harmless error analysis inappropriate when the defendant's statutory right to peremptory challenge was denied or impaired. The court nonetheless recognized that "not all restrictions on the right to peremptory challenge constitute the denial or impairment of the right," and shared the concurring judge's concerns about a broad automatic reversal rule. *Underwood*, 122 F.3d at 392 n. 3; Pet. App. 7a. To ameliorate against routine reversal, the panel proposed employing a narrow definition of "denial or impairment." *Id.*

b. In a concurring opinion, Judge Flaum questioned *Swain's* most sweeping rhetoric. *Id.* at 398; Pet. App. 23a.

Nonetheless, Judge Flaum believed reversal necessary because the defendants were materially misled about the jury selection procedure. *Id.* Judge Flaum observed that the violation of Rule 24 of the Federal Rules of Criminal Procedure was not merely technical, since, as Judge Eschbach's opinion demonstrated, the defendants had inadequate notice of the jury selection method, thereby subverting strategic jury selection choices. *Id.* at 398-99; Pet. App. 22a-23a. Judge Flaum regarded it critical for the defense to understand which peremptory strikes were being exercised against whom. *Id.* at 399; Pet. App. 23a.

The concurring judge also understood that this case did "not involve considerations that might warrant more forgiving appellate treatment." *Id.* Unlike the present case, future claims regarding the denial of peremptory challenges more likely would involve *Batson v. Kentucky*, 476 U.S. 79 (1986), situations. *Underwood*, 122 F.3d at 399 (Flaum, J., concurring); Pet. App. 24a-25a. Suggesting that loss of a peremptory may not be the type of structural defect that always necessitates reversal, Judge Flaum found this case to be a tiger of a different stripe:

> [B]ecause it is notoriously difficult to estimate the effect of a juror on the outcome of a trial, questions of jury selection tend to defy harmless-error analysis. The prospect that the loss of peremptory challenges will inevitably be considered harmless should cause a court to swallow hard before abandoning a rule of automatic reversal. In the instant case, however, we face no such dilemma. No countervailing constitutional imperative led the district court to impinge upon the defendants' right to the exercise of their peremptories; there simply (and

> unfortunately) was a critical miscommunication between the bench and bar. Given the significance of the error that occurred here and the lack of any compelling reason to afford expanded latitude to the trial court, *this case does not present an occasion to examine whether the denial of peremptory challenges should ever be subject to harmless-error review.*

Id. at 399; Pet. App. 25a-26a (emphasis added).

4. The government petitioned for rehearing, and suggested rehearing en banc. While a vote of the active members of the Seventh Circuit was requested, a majority voted to deny rehearing en banc, and all of the judges on the original panel voted to deny the petition for rehearing. *United States v. Underwood*, 130 F.3d 1225 (7th Cir. 1997); Pet. App. 27a. Judge Easterbrook, joined by Chief Judge Posner and Judges Manion and Evans, dissented from the denial of rehearing en banc. Judge Easterbrook's dissenting opinion is discussed throughout the certiorari petition.

REASONS FOR DENYING THE WRIT

1. In an effort to attain this Court's certiorari jurisdiction, the government raises a circuit-split banner. The cry of dissension, however, rests upon an chimerical foundation. The issue before the Seventh Circuit was whether the district court's failure to provide accurate notice of jury selection procedures, necessary for the intelligent exercise of peremptory challenges, warranted reversal. Courts of appeal that have confronted this issue

have uniformly found reversal appropriate. *See United States v. Ricks*, 776 F.2d 455, 458-61 (4th Cir. 1985) (nine defense attorneys reasonably believed that the jury would be selected from the top of a jury selection list and concentrated their strikes there, but the court selected jurors from below the top; reversal ordered since the practical effect of defense counsels' belief concerning jury selection "was to frustrate the exercise of their peremptory strikes"), *amended on rehearing en banc*, 802 F.2d 731 (1986); *United States v. Turner*, 558 F.2d 535 (9th Cir. 1977) (reversal ordered where absent supplying the defendant with adequate notice of the particular jury selection system employed, the district court precluded the exercise of a peremptory challenge on grounds that the defendant's acceptance of a jury panel constituted use of a challenge); *United States v. Sams*, 470 F.2d 751 (5th Cir. 1972) (in line with local custom, defense counsel attempted to exercise a back strike which a visiting judge prohibited; court of appeals reversed for a new trial, finding that defense counsel lacked notice of the jury selection system, and that the court abused its discretion by impeding the exercise of peremptory challenges when it refused to allow back strikes).

The government does not present good reason to disturb this unbroken line of precedent. Cases cited by the government do not raise an authentic conflict. Indeed, none involved a district court providing inadequate notice of its jury selection method. *United States v. Horsman*, 114 F.3d 822, 825 (8th Cir. 1997), *Getter v. Wal-Mart Stores*, 66 F.3d 1119, 1122 (10th Cir. 1995), *United States v. Rubin*, 37 F.3d 49, 54 (2nd Cir. 1994), *United States v. McIntyre*, 997 F.2d 687, 697-98 (10th Cir. 1993), *United*

States v. Bryant, 991 F.2d 171, 174 (5th Cir. 1993), and *United States v. Farmer*, 923 F.2d 1557, 1566 & n. 20 (11th Cir. 1991), all entailed appellants arguing that the district court had erroneously failed to excuse a juror for cause, thereby forcing use of a peremptory challenge. In none of the cases did the questioned juror sit on the jury. From the context of review of a state court conviction, *Ross v. Oklahoma*, 487 U.S. 81 (1988), teaches that forcing use of a peremptory challenge does not mandate reversal absent a showing that the jurors who sat were biased. Obviously, this case is not a *Ross* case, and the government does not so contend in its certiorari petition (only citing *Ross* for the proposition that peremptory challenges are not constitutionally mandated). *See* Pet. at 16 n. 8.

The government also cites *United States v. Love*, 134 F.3d 595 (4th Cir. 1998), to support the existence of supposed intra-circuit conflicts. *See* Pet. at 12 n. 5. However, the Fourth Circuit in *Love* expressly addressed its prior decision in *Ricks* and found it to be distinguishable since the *Love* district judge "explained the jury selection procedure in accurate terms in advance of trial." *Love*, 134 F.3d at 602 n. 2.

Nor did the Seventh Circuit's decision here deviate from prior Seventh Circuit cases, as claimed by the government. *See* Pet. at 11 n. 4. In *United States v. Widgery*, 778 F.2d 325 (7th Cir. 1985), the appellate court affirmed where the trial judge had answered a jury question absent conferring with the defense. (*Widgery* nevertheless recognized that "[s]ometimes it is so difficult to tell whether the violation of a rule has injured the defendant, and so likely that the violation did, that the violation cannot be harmless error." *Id.* at 329.) In *United States v. Dennis*, 737

F.2d 617 (7th Cir. 1984), the defendant merely protested the trial judge's requiring defense counsel to confer about the jury selection in the courtroom. Clearly, this case presents radically different facts and legal issues.

As there is no bona fide inter-circuit or intra-circuit conflict on the particular issue decided by the court below, the petition for certiorari should be denied.

2. This case does not present an appropriate vehicle to consider the question presented by the government. Notwithstanding claims to the contrary, the particular fact-specific issue here simply does not recurrently arise. This Court can safely presume that district judges ordinarily provide sufficient notice of jury selection procedures, and then select juries in accordance with their explanations. The infrequency of the issue here is also evident from the small number and wide temporal distance between cases in which inadequate notice of jury selection procedures has arisen, i.e., *Sams* (1972), *Turner* (1977), *Ricks* (1985) and *Underwood* (1997).

Additional reasons bode against a grant of certiorari. The court of appeals did not act in gross deviation of established precedent. Indeed, this is not a forced-use case in which the court of appeals digressed from *Ross*. Nor does this case implicate *Batson* concerns in which reversal may be more debatable since the district court is afforded some "margin of error." *See Underwood*, 122 F.3d at 399 (Flaum, J., concurring); Pet. App. 24a-26a ("this case does not present an occasion to examine whether the denial of peremptory challenges should ever be subject to harmless-error review" since the error here was significant, and not allayed by compelling reasons to give the

district court expanded latitude). Accepting the government's position here could actually jeopardize *Batson* and its progeny since the rule that racially motivated peremptory challenges require reversal could fall by the wayside if all jury selection errors are branded "harmless."

Both before the Seventh Circuit panel and in its petition for rehearing, the government vigorously argued that no error occurred. The government has now abandoned the point. Under this Court's Rule 14(1)(a), all questions subsumed within the question presented are fair game. Thus, while we steadfastly maintain that error occurred, analysis of the question presented could require this Court to embark upon a fact-resolution journey, parsing and interpreting the particular district judge's oral explanations of his jury selection method, and even assessing the veracity and reasonableness of defense counsel.[6] Such fact-specific inquiries typically are not the function of this Court. Moreover, if this Court found that no error occurred – a contention we resolutely dispute – then the question framed by the government would not

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[6] In the court of appeals, the government contended that the district court's statement "we will do it in the manner in which they are called," 2/13 Tr. 11, provided the defense with notice of the jury selection procedure employed. Before this Court, therefore, could be questions of whether defense counsel acted unreasonably in failing to discern the actual jury selection method based upon the quoted statement. This Court could also have to consider whether the statement "we will do it in the manner in which they are called" excluded the idea that replacement prospective jurors would take a position at the end of the pool, or eviscerated the district judge's prior direction that "the first 18 that are left [in the jury box] will be the jury." 2/13 Tr. 10.

even be before the Court. For these reasons as well, certiorari should be denied.

3a. The government argues that the Seventh Circuit ignored Rule 52(a) of the Federal Rules of Criminal Procedure and 28 U.S.C. § 2111. However, the court of appeals adhered to the longstanding principle that impairment of the peremptory challenge right is reversible error without a showing of prejudice, a rule that has roots in *Swain v. Alabama*, 380 U.S. 202, 219 (1965), *Lewis v. United States*, 146 U.S. 370, 376-78 (1892), *Harrison v. United States*, 163 U.S. 140, 142 (1896), *Gulf, Colorado & Santa Fe Railway Co. v. Shane*, 157 U.S. 348, 351 (1895), has been held to endure *Batson*, *see United States v. Annigoni*, 96 F.3d 1132, 1141 (9th Cir. 1996) (*en banc*), *Kirk v. Raymark Industries, Inc.*, 61 F.3d 147, 158 (3rd Cir. 1995), *United States v. Bentley-Smith*, 2 F.3d 1368, 1375 n. 7 (5th Cir. 1993), *United States v. Ruuska*, 883 F.2d 262, 268 (3rd Cir. 1989), and is consistent with *Gomez v. United States*, 490 U.S. 858 (1989).

There is nothing incompatible between harmless error analysis and the per se reversal rule employed in this case. In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), this Court identified a "spectrum" between trial errors – errors that occur during presentation of the case to the jury and are amenable to harmless error analysis since they may be quantitatively assessed in the context of other evidence for outcome-determinative effect – and "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *See also Sullivan v. Louisiana*, 508 U.S. 275 (1993); *Arizona v. Fulminante*, 499 U.S. 279 (1991); *Rose v. Clark*, 478 U.S. 570, 578 (1986); *Chapman v. California*, 386 U.S. 18, 23 and n. 8

(1967). In the latter instance, *Brecht* approved the automatic reversal remedy since such errors "infect the entire trial process." *Brecht*, 507 U.S. at 629-30.

Similarly, in *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), this Court recognized that there are a class of cases that do not require "a particular assessment of the prejudicial impact of the errors . . . because the errors are deemed fundamental." *Id.* at 256. As examples, this Court cited *Vasquez v. Hillery*, 474 U.S. 254 (1986), and *Ballard v. United States*, 329 U.S. 187 (1946), and reconciled these cases by noting that "[t]he nature of the violation allowed a presumption that the defendant was prejudiced, and any inquiry into harmless error would have required unguided speculation." *Nova Scotia*, 487 U.S. at 257.

Or, as stated in *Gomez v. United States*, 490 U.S. 858 (1989), a case involving jury selection error:

> The Government concedes, as it must, that errors occurring during jury selection may be grounds for reversal of a conviction . . . Yet it argues that any error in these cases was harmless because petitioners allege no specific prejudice as a result of the Magistrate's conducting the voir dire examination . . . We find no merit to this argument. Among those basic fair trial rights that " 'can never be treated as harmless' is a defendant's right to an impartial adjudicator, be it judge or jury."

Id. at 826.

In view of all this, there is nothing exceptional about the idea that impairment of the right to intelligent exercise of peremptory challenges, affecting the very composition and structure of the adjudicatory body, is unamenable to harmless error analysis and presumptively prejudicial.[7] The Seventh Circuit's decision to reverse was not erroneous, and was within the mainstream of the law.[8]

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[7] The following factors underscore this conclusion: the consequences of jury selection error of the type here do not occur during the evidentiary presentation of the case, but manifest themselves as an ongoing feature of the trial; the error is incapable of being quantitatively assessed in the context of other evidence; the error does not lend itself to determining whether the judgment was substantially swayed by it; there is no measuring what effect the desired (but excluded) jurors would have had on deliberations; and there is no telling how unwanted jurors influenced deliberations. *See Annigoni*, 96 F.3d at 1144-45.

[8] *See United States v. Schneider*, 111 F.3d 197, 204 (1st Cir. 1997) ("In a number of cases involving interference with peremptory challenges, the reviewing court has treated proof of prejudice as unnecessary."); *United States v. Taylor*, 92 F.3d 1313, 1325 (2nd Cir. 1996) ("Defendants correctly assert that if their right to exercise peremptory challenges has been denied or impaired, they need not show that the jury was biased in order to obtain a new trial."); *Kirk v. Raymark Industries, Inc.*, 61 F.3d 147, 160 (3rd Cir. 1995) ("[A] showing of prejudice is not required to reverse a verdict after demonstrating that a statutorily-mandated, peremptory challenge was impaired."); *United States v. Broussard*, 987 F.2d 215, 221 (5th Cir. 1993), *abrogated on other grounds by J.E.B. v. Alabama*, 511 U.S. 127 (1994) ("The denial or impairment of the right to exercise peremptory challenges is reversible error without a showing of prejudice."); *Knox v. Collins*, 928 F.2d 657, 661 (5th Cir. 1991) (same); *Ruuska*, 883 F.2d at 268 ("We read the long line of Supreme Court

Johnson v. United States, 117 S. Ct. 1544 (1994), does not foreclose application of the rule that some errors, not amenable to harmless error analysis, are presumptively prejudicial. To be sure, *Johnson* observed that none of the "structural" error cases cited by the petitioner were direct federal appeals. But this does not correlate into the proposition that some cases do not require "a particular assessment of the prejudicial impact of the errors . . . because the errors are deemed fundamental." *Nova Scotia*, 487 U.S. at 256. Indeed, *Gomez* was a direct federal appeal in which this Court ruled the jury selection error presumptively prejudicial.

Moreover, *Johnson* did not discard the "structural error" concept. While not needing to decide the question, *Johnson* seemingly harmonized structural error with harmless error doctrine:

> But even though the error be "plain," it must also "affec[t] substantial rights." It is at this point that petitioner's argument that the failure to submit an element of the offense to the jury is

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authority that culminated in *Swain* to say that the denial or impairment of the right to peremptory challenges is reversible error *per se*."); *Carr v. Watts*, 597 F.2d 830, 833 (2nd Cir. 1997) ("In . . . circumstances of direct impairment . . . '[t]he denial or impairment of the right is reversible error without a showing of prejudice.' "); *United States v. Johnson*, 584 F.2d 148, 155 (6th Cir. 1978) ("A trial court commits reversible error if, by unduly restricting voir dire, it substantially impairs the peremptory challenge right."); *United States v. Rucker*, 557 F.2d 1046, 1049 (4th Cir. 1977) ("A voir dire that has the effect of impairing the defendant's ability to exercise intelligently his challenges is ground for reversal, irrespective of prejudice.").

> "structural error" becomes relevant. She contends in effect that if an error is so serious as to defy harmless-error analysis, it must also "affec[t] substantial rights." A "structural" error, we explained in *Arizona v. Fulminante*, is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.

117 S. Ct. at 1549.

With this in mind, the illusory nature of the government's argument that the Seventh Circuit improperly ignored harmless error dogma becomes apparent. The presumption of prejudice in the face of impairment of the peremptory challenge right fits within the framework of Rule 52(a) of the Federal Rules of Criminal Procedure and 28 U.S.C. § 2111. Under these provisions, the government must prove that the error did not affect substantial rights. *See United States v. Olano*, 507 U.S. 725, 732-35 (1993). "Impairment" of the exercise of a right obviously "affects" the right. The question then becomes whether the right to peremptory challenges is a "substantial right." This is easy; the right to peremptory challenge not only implements the fair jury trial right, *Holland v. Illinois*, 493 U.S. 474, 482 (1990), *Rosales-Lopez v. United States*, 451 U.S. 182, 188 n. 6 (1981), but is also "one of the most important rights secured to the accused." *Pointer v. United States*, 151 U.S. 396, 408 (1894). *See also Batson*, 476 U.S. at 98. As the right to peremptory challenge is a "substantial right," and because the error "affected" this right, the

error below was not harmless within meaning of Rule 52(a) and § 2111.[9]

b. The government attempts to show lack of harm by looking solely to the effect of the inadequate notice upon the jury's composition. The government's hindsight analysis, however, does not appreciate that the overall exercise of peremptory challenges was tainted. Exasperated by the unusually high number of potential jurors excused for cause, the respondents' peremptory challenge choices were neither knowing nor intelligent. The jury's structure was affected by more than two jurors who would have been excused if defense counsel had been aware of the trial court's selection method. Indeed, the government fails to address the fact that two potential jurors, not challenged by the defense and believed to be regular jurors, ultimately did not serve on the petit jury.

Harmless error analysis often implicates assessment of the strength of the government's case. *Cf. Olano*, 507 U.S. at 734-35. But here the government makes no effort to establish overwhelming proof. Given, as a general

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[9] *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), is not to the contrary. That case was a civil case which did not implicate Rule 52 of the Federal Rules of Criminal Procedure, or the constitutional concerns associated with the Fifth and Sixth Amendment rights to a fair trial. Moreover, *McDonough* did not raise the specter of a party's entire jury selection strategy being skewed by deficient notice of jury selection procedures. Unlike this case, there was no claim in *McDonough* that the district judge had failed to explain its selection method adequately. Rather, a juror in *McDonough* had given a mistaken but honest response to a question during voir dire.

matter, the acquittal of three defendants notwithstanding the testimony of many of the same witnesses who testified against the respondents, the admittedly "close" question of whether the government proved single or multiple conspiracies and Dick Messino's withdrawal defense, the lack of effect upon substantial rights cannot be gainsaid. Additionally, the endeavor necessary to gauge harmless error in a case of this sort necessitates a type of fact-intensive inquiry that normally and wisely is not within the purview of this Court's responsibilities. *See Connecticut v. Johnson*, 460 U.S. 73, 102 (1983) (Powell, J., dissenting) (prejudice resulting from an error is "[n]ormally . . . a question more appropriately left to the courts below," *inter alia*, because "[t]here may be facts and circumstances not apparent from the record before us"). *See also United States v. Young*, 470 U.S. 1, 30-31 n. 14 (1985) (Brennan, J., concurring in part and dissenting in part) (citing cases where this Court did not engage in harmless or plain error analysis but instead remanded).

The alternative is to say that jury selection error not being easily amenable to harmless error inquiry renders all such errors harmless. However, this is an invalid reading of Rule 52 and § 2111, which by their plain terms ask whether the error affected substantial rights. Rule 52 and § 2111 are not binary; neither speak in all or nothing terms. Contrary to Judge Easterbrook's dissent, a finding of error in the jury selection process not only is "worth investigation," but must be investigated. Fortunately, the Seventh Circuit opinion in this case, as well as Judge Flaum's concurrence, proposed a satisfactory middle ground, i.e., that the per se reversal rule be rarely invoked as a consequence of narrowly defining "denial or

impairment" of the peremptory challenge right. *See Underwood*, 122 F.3d at 392 n. 3; Pet. App. 7a. As the composition of the jury in this case was materially altered by the error, and since the error plainly fell within a circumscribed definition of "impairment", the Seventh Circuit's decision was sound, and need not be reviewed. *Cf. Olano*, 507 U.S. at 745 (Stevens, J., dissenting) ("Certainly, the courts of appeals are better positioned than we are to evaluate the need for firm enforcement of a procedural rule designed to protect the integrity of jury deliberations and to weigh the interest in such enforcement against other relevant considerations.")

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

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